

IN THE MICHIGAN SUPREME COURT

In the Matter of MAYS, Minors

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

WALI PHILLIPS,

Respondent-Appellant.

Lower Court No.: 09-485821-NA

Court of Appeals No.: 297447

Supreme Court No.: 142566

**BRIEF OF AMICUS CURIAE
STATE BAR OF MICHIGAN FAMILY LAW SECTION**

State Bar of Michigan Family Law Section *by*:

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QUESTIONS PRESENTED

Whether the so-called “one parent” doctrine, first adopted in *In re CR*, 250 Mich App 185 (2001), should be overturned?

Amicus FLCO answers: Yes.

- I. Do individual parents have a fundamental due process liberty interest in a relationship with their children? Is this fundamental interest based on the inherent status of being a parent? Does the judicially created “one-parent” doctrine patently violate this protected Constitutional interest?

Amicus answers Yes.

- A. Does a child have a mutual due process liberty interest in a relationship with each parent – and is this mutual interest severable only upon an individualized showing of unfitness in an appropriate proceeding?

Amicus answers Yes.

- B. Is it true that non-custodial parents do not lose their Constitutional rights to parent and that a circuit court custody order affects the arrangement between the two parents and does not eliminate fundamental parental rights?

Amicus answers Yes.

- II. Is *In re CR* factually distinguishable from this case and did it fail to fully consider the constitutional issues?

Amicus answers Yes.

STATEMENT OF INTEREST OF AMICUS

The Family Law Council is the governing body of the Family Law Section of the State Bar of Michigan. The Family Law Section (FLS) is comprised of over 2,400 lawyers in Michigan practicing in the area of family law, and it is the section membership which elects 21 representative members to the Family Law Council. The Council provides services to its membership in the form of educational seminars, monthly Family Law Journals (an academic and practical publication reporting new cases and analyzing decisions and trends in family law), advocating and commenting on proposed legislation relating to family law topics, and filing Amicus Curiae briefs in selected family law cases filed in Michigan Courts.

The Council, because of its active and exclusive involvement in the field of family law, and as part of the State Bar of Michigan, has an interest in the development of sound legal principles in the area of family law.

The members of the Family Law Section represent both custodial and non-custodial parents in a variety of proceedings. The issues in the instant case concern the fundamental constitutional rights of parents and children - in particular the due process liberty interests of non-custodial parents.

STATEMENT OF FACTS

FLS adopts the Statements of Jurisdiction, Judgment and Order appealed From and Relief Sought, and Statement of Material Proceedings and Facts, found in Respondent-Appellant's Application. *Id.* at 1-10, 13-20.

ARGUMENT

- I. **Individual parents have a fundamental due process liberty interest in a relationship with their children. This fundamental interest is not derived through nor is it dependant upon the other parent, but is based on the inherent status of being a parent. The judicially created “one-parent” doctrine patently violates this protected Constitutional interest.**

The United States Supreme Court addressed the constitutional dimension of parental rights in family court cases in *Troxel v. Granville*, 530 U.S. 57, 69, S Ct 2054 (2000). *Troxel* held that the Fourteenth Amendment’s Due Process Clause has a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests – declaring that parents have “perhaps the oldest of the fundamental liberty interests recognized by this Court,” i.e. the right to determine the care, custody, and control (including the associations) of their children. *Id* at 530 US at 65.¹

There is nothing in this Constitutionally protected parent-child relationship that limits that right to two-parent intact families. The right exists for each individual parent and his or her children. See e.g. *Rust v Rust*, 846 SW2d 52, 56 (Tenn. Ct. App 1993)(single-parent family unit entitled to similar measure of constitutional protection against unwarranted governmental intrusion as accorded intact two-parent family). See also *Troxel* (single mother); *Hunter v Hunter*, 484 Mich 247, 771 NW2d 694 (2009)(single mother entitled to Constitutional protections); *Frame v Nehls*, 452 Mich 171, 550 NW2d 739 (1996) (paternity cases involving unmarried parents, finding that compared to parents [including single parents], grandparents have no fundamental right to a relationship with the child); *Duchesne v Sugerman*, 566 F.2d 817, 825 (2nd Cir. 1977)(the right

¹The importance of a parent’s “essential” and “precious” right to raise his or her child is well-established in our jurisprudence. *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009).

“extends to a mother and her natural offspring”).

This due process liberty interest is not derived through the other parent - but is inherent in the status of being a parent and is based on "blood relationship, state-law sanction, and basic human right." *Smith v. Organization of Foster Families (OFFER)*, 431 US 816, 846; 97 S Ct 2094 (1977).²

The individual's freedom to marry and reproduce is 'older' than the Bill of Rights ... [T]he liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in the intrinsic human rights, as they have been understood in this Nations history and tradition...'. *Id.*

Michigan law consistently recognizes this individualized right to parent. For example, the Child Custody Act, MCL 722.21, *et seq.*, provides the standards to determine child custody between competing parents. A trial court separately analyzes and applies the Act's best interest factors to assess each parent in relationship to the child or children in order to determine which parent should have custody. See MCL 722.23.³ As recognized Constitutionally, the parents are treated

²*Smith v OFFER, supra*, involved third-party foster parents' attempts to have input in determining the custody of children. The Supreme Court in *Smith* refused to acknowledge the claimed "liberty interests" of the foster parents as against the rights of the biological parent:

It is one thing to say that individuals may acquire a liberty interest against arbitrary government interference in the family-like associations into which they have freely entered, even without biological connection or state law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic-human right...."

³ The best interest factors are highly subjective and comparative - more appropriate between competing parents who each have the same Constitutional status as the other concerning the children. See MCL 722.23, *infra*.

722.23 "Best interests of the child" defined.

As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

individually because they have individual relationships with their children and a court must often make a decision awarding custody to one or the other.

- A. A child has a mutual due process liberty interest in a relationship with each parent – and this mutual interest is severable only upon an individualized showing of unfitness in an appropriate proceeding.**

This Court held in *In re Clausen*, 442 Mich 648, 502 NW2d 649 (1993) that parents and children share in the fundamental due process liberty interest and the mutual interest is not severable unless there is finding of unfitness:

The mutual rights of the parent and child come into conflict only when there is a showing of parental unfitness. As we have held in a series of cases, the natural parent's right to custody is not to be disturbed absent

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- (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
 - (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
 - (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
 - (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
 - (f) The moral fitness of the parties involved.
 - (g) The mental and physical health of the parties involved.
 - (h) The home, school, and community record of the child.
 - (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
 - (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.
 - (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
 - (l) Any other factor considered by the court to be relevant to a particular child custody dispute.

such a showing, sometimes despite the preferences of the child. *Clausen*, 442 Mich at 687 (emphasis added).

See also *Herbstman v Shiftan*, 383 Mich 64, 108 NW2d 869 (1961).

Troxel is based on a Constitutional presumption that a parent is fit and that a fit parent acts in the best interest of his or her child. As Justice O'Connor explained, there is "a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." 530 US at 68. The Constitution recognizes this "presumption that fit parents act in the best interests of their children." *Id.*

The probate court could not exercise jurisdiction over Appellant based on a generalized theory such as the "one parent" doctrine. There were no specific allegations against Appellant-Phillips that justified assumption of jurisdiction. See *Adams v Adams*, 100 Mich App 1, 14; 298 NW2d 871 (1980) (error where findings not established by record evidence, but based on speculation, mere conclusions). The court's reliance on the conduct of the other parent was not a sufficient basis for court authority over Appellant and further, the court's actions violated Appellant's individual liberty interest in parenting his child. See *Clausen, supra*.

The necessity of a fair procedure is particularly important where a parent's rights may be terminated. "There is no question that parents have a due process liberty interest in caring for their children" *In re AMB*, 248 Mich App 144, 209; 640 NW2d 262 (2001). Because "[t]his right is not easily relinquished," "to satisfy constitutional due process standards, the state must provide the parents with fundamentally fair procedures." *Id.* at 257 (internal quotation omitted).

"Termination cases introduce a significantly heightened intrusion upon a parent's fundamental right to parent because they involve an all-or-nothing proposition: whether a

parent's right to be a parent and make decisions regarding his or her child's upbringing is permanently severed. It follows logically that under circumstances where the parental interest is most in jeopardy, due process concerns are most heightened." *Hunter, supra* 489 Mich at 269. Further, "[i]n termination cases, the natural parent and the state are the parties to the action. To protect the parental interest from improper state intrusion, the Legislature requires the state to prove by clear and convincing evidence that at least one statutory ground for termination exists. Hence, the state must show that the natural parent is unfit." *Id.* at 270.

A fitness standard recognizes both the liberty and other interests attached to the parent-child relationship and the societal interests in preserving that relationship. In *Parham v J.R.*, 442 US 584; 99 S Ct 2493 (1979), counsel for a child sought to argue that the child had a competing liberty interest (in the child's admission to a mental health care facility) which needed to be balanced against that of the natural parents. The Court, recognizing the long-standing presumption that parents act in the best interests of their child, rejected this argument, concluding "that our precedents permit the parents to retain a substantial, if not the dominant, role in that decision, absent a finding of neglect or abuse ..." *Id.* at 604. (emphasis added).⁴ In *Stanley v Illinois*, 405 US 645; 92 S CT 1208, 31 L Ed 551 (1972), the United States Supreme Court held that a parent (a single father) cannot be denied rights to his children without a hearing on his parental fitness.

Michigan provides an extensive statutory scheme concerning the placement of children and termination of parental rights. The Constitutional presumption - that each parent is fit and a fit

⁴ The relatively more objective fitness standard (as compared to a comparative standard, such as a best interest test, for example) offers protection against the impermissible insertion of a subjective judgment by the trier of fact. *See Troxel, supra*.

parent acts in the best interest of a child – cannot be overcome absent an individualized finding of unfitness in an appropriate proceeding under probate court jurisdiction. *Ruppel v Lesner*, 421 Mich 559, 565 n. 5, 364 NW2d 665 (1984). A parent should not be brought under probate court jurisdiction based solely on generalized allegations that the other parent acted improperly, in the absence of any substantiated and specific claims against him or her. See *Adams v Adams*, *supra* (cannot base findings on speculation, mere conclusions). This approach contradicts the Constitutionally-based presumption that *each* parent is fit and accordingly acts in the best interest of their children.

The Courts reliance on the generalized “one parent doctrine,” rather than an individualized separate fitness determination for each parent violates due process. To the extent that Michigan statutes and court rules permit the probate court to obtain jurisdiction over a parent based on allegations against the other parent and then to terminate that parent’s parental rights without a finding of unfitness, those rules and procedures are clearly unconstitutional.

B. Non-custodial parents do not lose their Constitutional rights to parent; a circuit court custody order affects the arrangement between the two parents and does not eliminate fundamental parental rights.

Members of the State Bar of Michigan Family Law Section represent both custodial and non-custodial parents. Simply because a parent does not have custody (because of a decision in a divorce or custody dispute with the other parent), does not mean that the non-custodial parent has somehow lost his or her protected Constitutional status and relationship with a child. Where the non-custodial parent has not engaged in conduct sufficient to charge him or her with abuse or neglect under the jurisdictional provisions of the probate code, the state, through its own action, violates the U.S. Constitution if it utilizes a policy like the one-parent doctrine to subject him or her (and the children) to termination of parental rights proceedings.

A circuit court custody order is between the competing parents - who have the same Constitutional rights vis-a-vis each other regarding the children. *In re Clausen, supra*. A circuit court custody order does not extinguish the non-custodial parent's fundamental liberty interest, nor does it lessen his or her Constitutional status regarding the children, is simply adjusts the custodial arrangement between two Constitutionally equivalent parties. A non-custodial parent, whether the other parent has sole custody, always has the ability to petition the family court for a custody or parenting time order (requesting a modification) under the Child Custody Act, MCL 722.27, or an order for guardianship, MCL 700.5205, in the best interests of the child.

Here, because Father's parental rights were terminated by the State, even though there was no finding that he abused or neglected the child, he is permanently barred from seeking such relief under the Child Custody Act. The probate court's actions violate his fundamental right to parent and to seek orders that he believes are in his child's best interest. The probate courts do not appear to be considering the rights of non-custodial parents, who have specific avenues of relief under circuit court orders and Michigan law, nor the availability of non-custodial parents to step in when the custodial parent is no longer able to act as a custodian. Non-custodial parents have the immediate Constitutional right to take over custody if the custodial parent has acted in a way harmful to the child or children.

The approach taken in this case violates the heightened fairness requirements emphasized in *Hunter, supra*, and violated Appellant's individual liberty interest in parenting his child. See *Clausen, supra*.

II. *In re CR* is factually distinguishable and failed to fully consider the Constitutional issues.

In re CR, 250 Mich App 185, 646 NW2d 506 (2001), apparently the seminal “one-parent” doctrine case, is actually much more limited than the cases citing *In re CR* would indicate. It is true that the ruling seems broad: the court did say that once the family court acquires jurisdiction over the children, it can hold a dispositional hearing to determine measures to be taken *against any adult*, and that the court does not have to allege and prove abusive or neglectful conduct against the other parent. *In re CR*, 250 Mich App at 202-203. However, this apparently broad language would seem to be limited by important facts in that case: The Family Independence Agency (now the Department of Human Services) and the two parents (who still lived together) agreed that mother would enter a no-contest plea to the allegations in the petition; that the Family Independence Agency would dismiss the allegations against father, and the children would be placed with father subject to a variety of conditions, including drug testing and other Family Independence Agency services. *Id* at 188.

The case could arguably have rested on the father’s agreement to the order (and subsequent failure to comply), not to mention the fact that the parents lived together (so the home conditions were the same for both parents). In fact, *In re CR* does not address the adequacy of the agreement and waiver of Constitutional rights. This Court, in *People v Grimmet*, 388 Mich 590, 598, 202 NW2d 278 (1972), stated:

Waiver, is defined in *Johnson v Zerbst*, 304 US 458, 464, 58 S Ct 1019, 82 L Ed 1461 (1938), as “an intentional relinquishment or abandonment of a known right or privilege.” The court added “courts indulge every reasonable presumption against waiver” of fundamental constitutional rights and we “do not presume acquiescence in the loss of fundamental rights.” Thus, waiver consists of two separate parts: 1) a specific knowledge of the constitutional right; and 2) an intentional decision to abandon the protection of the constitutional right. Both of these elements must be present and if either is missing there can be no waiver and no finding of consent.

(emphasis added).

See also *People v Williams*, 475 Mich 245, 260, 716 NW2d 208 (2006). In the instant case, there has been no explicit or implicit waiver of Appellant's fundamental parental liberty interest. There is absolutely no indication that Appellant specifically knew of his constitutional right or that he made an intentional decision to abandon voluntarily the protections of the mutual parent-child liberty interest.

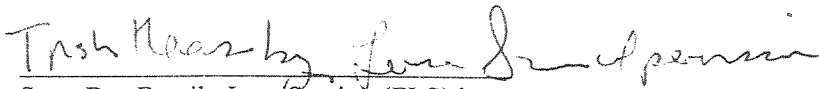
In re CR ostensibly mentioned due process concerns, but then found that the father had not properly raised the issue. *Id* at 205-206. To the extent it discussed due process, the discussion merely indicates the requirements of the court rules, but does not address the constitutionality of those court rules.

Further, *In re CR* clearly did not discuss the situation where there is a non-custodial parent who does not enter into a consent agreement with the agency. The Court's opinion in *In re Mays* does not expressly deal with the "one-parent" doctrine, nor why Appellant had a treatment plan — apparently indicating or assuming that this situation is now the accepted norm, needing no discussion.

CONCLUSION

Each parent has a Constitutionally protected, individualized liberty interest in a relationship with his or her children - a liberty interest that is shared between each parent and children. This mutual interest is not severable unless there is a showing of unfitness. A court's reliance on the neglectful conduct of one parent to justify its authority over the other parent who did nothing improper violates that parent's individual liberty interest in parenting his or her child. Thus, application of the "one-parent" doctrine to support termination of Appellant-Phillips parental rights is unconstitutional.

Respectfully submitted,



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